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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: NOV 14 2011

OFFICE: TEXAS SERVICE CENTER

[redacted]

IN RE: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a market research business specializing in ornamental plants. It seeks to permanently employ the beneficiary in the United States as a market research analyst and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

The Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, the labor certification application (ETA Form 9089) was accepted by the DOL on October 19, 2007. Box G of the form states that the "offered wage" for the market research analyst is $34,091/year. Box H of the ETA Form 9089 states that the position requires a master's degree in business administration, economics, or marketing, or a bachelor's degree in one of those fields and five years of progressive work experience.

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[1] An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree . . . ."

The petitioner is structured as an S corporation. On its immigrant visa petition, filed April 28, 2008, the petitioner claimed to have been established in 1997 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on or about April 2, 2008, the beneficiary stated that he worked for the petitioner from January 13, 2005 to October 19, 2007. (This was the date the ETA Form 9089 was filed with the DOL, though documentation elsewhere in the record appears to indicate that the beneficiary continued to work for the petitioner after October 2007.)

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In his Decision dated October 6, 2008, the Director found that the petitioner had not established its ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2).[2] Focusing on the year 2007, the Director found that the petitioner's net income and net current assets, as recorded in its federal tax returns, were both in the negative, and that the amount of compensation the petitioner actually paid the beneficiary, as documented in the record, was less than the annualized proffered wage. Accordingly, the Director denied the petition.

On appeal counsel asserts that because the petitioner is an S corporation wholly owned by Francois Breney, the owner's own financial resources should also be taken into consideration. In a brief dated December 27, 2008, counsel described [redacted] assets – including stocks, bank accounts, real property, and motor vehicles – from which funds allegedly could have been extracted in 2007 to pay the

[2] The Director did not discuss the issue of the beneficiary's qualifications for the proffered position. The evidence of record, however, includes a photocopy of the beneficiary's college transcript, showing that he received a bachelor of arts degree in economics from [redacted] in Winter Park, Florida, on February 23, 1990, as well as a letter from the general director of a Swiss company, [redacted], dated April 8, 2008, stating that the beneficiary was employed as a market research analyst, obtaining progressive work experience, from December 1997 to December 2002. Accordingly, the beneficiary has the requisite qualifications for the proffered position under the regulation at 8 C.F.R. § 204.5(k)(2) ("A United States baccalaureate degree . . . followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree") and under the terms of the labor certification (Box H of the ETA Form 9089, stating that a master's degree in business administration, economics, or marketing, or a bachelor's degree and five years of experience is required).

proffered wage in full. Supporting documentation was submitted in support of this claim. In response to a Request for Evidence (RFE) issued by the AAO on July 27, 2011, the petitioner supplemented the record with copies of its federal income tax returns (Forms 1120S) and the beneficiary's Forms W-2, Wage and Tax Statements, for the years 2008-2010, as well as eight canceled checks the beneficiary received from the petitioner in the months of January to August 2011.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

In determining the petitioner's ability to pay the proffered wage between the priority date (in this case, October 19, 2007) and the present, the AAO first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. As previously mentioned, the beneficiary appears to have worked for the petitioner since January 2005. The beneficiary's Form W-2, Wage and Tax Statements, for the years 2007-2010 show that the petitioner paid the beneficiary the following amounts:

2007:	$27,851.04
2008:	$29,820.92
2009:	$30,000.00
2010:	$40,208.31

In addition, the eight canceled checks from the petitioner to the beneficiary in 2011 (in the amounts of $3,099.51 for the months of January and February, $3,188.69 for the months of March through August) add up to $25,531.16. Assuming the petitioner continues to pay the beneficiary at a monthly rate of $3,188.69 from September through December 2011 – which would be another $12,754.76 for the four-month period – the beneficiary's total compensation in 2011 would amount to $38,285.92.

Based on the foregoing documentation, it is evident that the beneficiary's compensation from the petitioner exceeded the annualized proffered wage of $34,091 only in 2010, and may do so again in 2011. For the years 2007-2009 the beneficiary's pay was below the annualized proffered wage. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (October 19, 2007) up to the present through its actual compensation paid to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, the AAO examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it [sic] represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

As shown in its federal income tax returns (Forms 1120S) for the years 2006-2010, the petitioner's net income was as follows: [4]

2006:	$ 47,232
2007:	$ - 81,544
2008:	$ 113,648
2009:	$ 27,754
2010:	$ - 65,012

As indicated by these figures, only in 2006 (a pre-priority date year) and 2008 did the petitioner's net income exceed the proffered wage of $34,091/year. In 2009 net income was below the annualized proffered wage, and in the years 2007 and 2010 the petitioner sustained substantial net losses. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (October 19, 2007) up to the present based on its net income over the years, especially in 2007 when the petitioner lacked sufficient net income to pay the difference between the proffered wage and the wage actually paid to the beneficiary.

As another alternate means of determining the petitioner's ability to pay the proffered wage, the AAO reviews the petitioner's net current assets as reflected on its federal income tax return. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

As shown in its federal income tax returns (Forms 1120S) for the years 2006-2010, the petitioner's net current assets were as follows:

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[4] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed September 21, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions, adjustments, and/or expenses shown on its Schedule K for all of the years in question, the petitioner's net income is found on Schedule K of its tax returns.

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

2006:	$ - 6,164
2007:	$ - 54,918
2008:	$ 59,576
2009:	$ 79,632
2010:	$ - 901

Only in 2008 and 2009 did the petitioner's net current assets exceed the proffered wage of $34,091/year. In the years 2006, 2007, and 2010 the petitioner's net current assets were in the negative. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (October 19, 2007) up to the present based on its net current assets over the years.

In view of the foregoing analysis, the AAO determines that the petitioner has established its ability to pay the beneficiary the proffered wage in 2006, 2008, 2009, 2010, and 2011 on the basis of either its net income or its net current assets or the compensation it actually paid to the beneficiary in those years. For 2007, however, the petitioner has not established its ability to pay the proffered wage by any of those three methods.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage in 2007. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage in 2007.

In this case, the petitioner's business was incorporated in 1997 and had just four employees at the time the instant petition was filed in 2008. The federal income tax returns in the record show that the petitioner's gross receipts were $465,596 in 2006, dropped to $387,841 in 2007, rose slightly in

the next two years ($410,008 in 2008 and $405,249 in 2009), and fell off again in 2010 to $346,658. From 2006 to 2007 gross receipts declined by around 15%, and over the longer time frame from 2006 to 2010 they declined by over 25% (close to $120,000). Thus, the petitioner has not demonstrated a steady path of growth. On the contrary, business has declined over the past five years, with 2007 and 2010 showing particularly sharp dropoffs. The business factors discussed above are not persuasive evidence of the petitioner's ability to pay the proffered wage in 2007.

Counsel asserts that the personal assets of the petitioner's sole owner, [redacted] should be taken into consideration because the company is an S corporation. Counsel cites an amendment to the petitioner's articles of incorporation that adds the following language:

> The Director of [redacted] shall contribute capital to the corporation consisting of cash and property, as needed for its continuing operation in perpetuity, and shall be responsible to contribute all working capital required by the corporation for the duration of the corporation.

Counsel contends that this amendment obligated [redacted] to commit his personal assets to ensure the viability of the company, even in down years like 2007, so that the petitioner's ability to pay the proffered wage is never in doubt. Without even addressing the legal weight of this amendment with respect to [redacted] financial obligation vis-à-vis the petitioner, the AAO notes that the amendment is dated December 15, 2008. Thus, it was not in existence during 2007 and has no probative value as evidence of the petitioner's ability to pay the proffered wage that year.

A statement from [redacted], dated December 16, 2008, claims that his company's bad business results in 2007 were due to a number of factors, including the onset of the global recession, low-cost competition, high gas prices, and plant diseases. Counsel contends that [redacted] had a personal net worth of $3,574,000 at the end of 2007, as set forth in a "Statement of Net Worth, 12/31/2007" prepared by a certified public accountant (CPA) in Orlando, Florida. Counsel discusses the assets of [redacted] – including a stock portfolio, bank accounts, multiple real property holdings, and motor vehicles including an expensive Porsche – and asserts that these resources can be utilized to make capital contributions to the petitioner, including funds to pay the proffered wage. Viewed in the proper context, counsel concludes, the petitioner's poor performance in 2007 should be regarded as an anomaly which did not undermine its ability to pay the proffered wage that year.

The AAO does not agree. None of the personal assets of [redacted] can be taken into consideration in this proceeding. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its owners and shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

While some of the bank account statements appear to be business rather than personal accounts, counsel's reliance upon them is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to demonstrate a petitioner's ability to pay

a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The only evidence in the record of any other assets owned by the petitioner is the reference in a balance sheet dated September 30, 2008, to fixed assets including the building in which it was located, business equipment, and vehicles. These items are not further described, and are not the types of assets that the petitioner could easily liquidate, or would have wanted to liquidate, in order to facilitate a cash infusion into the business to pay the proffered wage to the beneficiary in 2007. Regardless, the AAO has already considered the petitioner's net current assets in its review of the petitioner's tax returns.

Based on the foregoing analysis, the AAO concludes that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage for the market research analyst in 2007.

For all of the reasons discussed herein, the AAO determines that the petitioner has failed to establish its ability to pay the proffered wage to the beneficiary from the priority date (October 19, 2007) up to the present. Accordingly, the petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.